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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1962

No. 36

UNITED STATES OF AMERICA, Appellant,

versus

FIRST NATIONAL BANK AND TRUST COMPANY OF LEXINGTON, SECURITY TRUST COMPANY and FIRST SECURITY NATIONAL BANK AND TRUST COMPANY OF LEXINGTON, Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY.

MOTION TO AFFIRM.

JAMES PARK and R. W. KEENON,
310 First National Bank Bldg.,
Lexington, Kentucky, and
CLINTON M. HARBISON,
Security Trust Company Bldg.,
Lexington, Kentucky,
Attorneys for Appellee.

STOLL, KEENON & PARK,
310 First National Bank Building,
Lexington, Kentucky, and
HARBISON, KESSINGER, LISLE & BUSH,
Security Trust Company Building,
Lexington, Kentucky,
Of Counsel.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

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IN THE

Supreme Court of the United States

October Term, 1962

No. 590

UNITED STATES OF AMERICA, - - *Appellant*,

v.

FIRST NATIONAL BANK AND TRUST COMPANY OF LEXINGTON, SECURITY TRUST COMPANY and FIRST SECURITY NATIONAL BANK AND TRUST COMPANY OF LEXINGTON, - *Appellees*.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY AT LEXINGTON, KENTUCKY.

H. CHURCH FORD, CHIEF JUDGE, PRESIDING.

MOTION TO AFFIRM.

Pursuant to paragraph 1(c) of Rule 16 of the Revised Rules of this Court, First Security National Bank and Trust Company of Lexington ("First Security"), a national banking corporation resulting from the consolidation of First National Bank and Trust Company ("First National") and Security Trust Company ("Security") named as appellees herein, moves that the judgment of the district court be affirmed on the ground that the questions are so unsubstantial as not to need or warrant further argument.

OPINION BELOW.

The opinion of the district court is reported in 208 F. Supp. 457.

STATEMENT.

On March 1, 1961, almost two years ago, First National, a national bank, and Security, a state chartered bank, were consolidated into First Security, a national bank (Tr. 329, 464).* It has been operated continuously since that time and is now being operated as a single consolidated bank. Every statutory and regulatory requirement governing the method and procedure for effecting this consolidation was complied with in detail (J. S. 27).

Later, on the same day that the consolidation was effected, appellant filed this action (J. S. 27) under Section 4 of the Sherman Act† for injunctive relief against alleged violations of Sections 1 and 2 of the Sherman Act.‡ Issues were joined, extensive proof was taken for discovery purposes, and the case was tried almost one year after the consolidation was effected (J. S. 26). On July 27, 1960, exactly six months after the trial was completed, the trial court's opinion was rendered (J. S. 30), in which it was concluded that ". . . *the consolidation herein referred to*

*Record references are made to the record as certified by the Clerk of the trial court. "Tr." refers to the transcript of testimony; "PX" refers to the exhibits in the volume entitled "Stipulation and Plaintiff's Documents"; "DX" refers to the exhibits in the two volumes entitled "Defendant's Exhibits"; "J.S." refers to appellant's Jurisdictional Statement and Appendix.

†15 U.S.C. 4.

‡71 U.S.C. 1 and 2.

*clearly appears to have been the result of a lawful program of expansion on the part of the merging banks rather than an invidious scheme to restrain competition or to secure monopoly in the local field of banking"** (J.S. 29). Accordingly, on July 30, 1962, an order was entered dismissing the complaint (R. 1945) and notice of appeal was filed on September 14, 1962 (R. 1946-7). Jurisdictional Statement was filed and served on appellees on November 14, 1962.

The present controversy resulting in this appeal is the end product of an internecine struggle between two coordinate branches of the Federal Government, with the appellee bank as the unfortunate victim of this inter-governmental conflict.

For more than five years—1955 to 1960—Congress considered a total of seven bills dealing with the competitive aspects of bank mergers and providing for a greater measure of Federal control over them. It was generally conceded that existing law was inadequate, but the protracted statutory history† of the bank merger law‡ finally passed by Congress on May 13, 1960, was the direct result of the two conflicting viewpoints of the Federal banking agencies involved on the one hand and the Department of Justice on the other.

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*Unless otherwise indicated, all emphasis is that of the writer.

†For a review of the legislative history of the bank merger act, see "Wempler and Cutler, The Federal Bank Merger Law and the Antitrust Laws," 16 Bus. Law, 994, 999 (1961); and Note in Vol. 75 Harvard Law Review, page 756 (Feb. 1962), "Federal Regulation of Bank Mergers; The Opposing Views of the Federal Banking Agencies and the Department of Justice."

‡The act is entitled: "An Act to Amend the Federal Deposit Insurance Act to Require Federal Approval for Mergers and Consolidations of Insured Banks" (Senate Bill No. 1062) (74 Stat. 129, 12 U.S.C.A., ¶ 1828(c) (Sup. 1960).

Notwithstanding that the Senate and House Reports* would clearly indicate that it was the intent of Congress to resolve the long standing dispute in favor of the Treasury the trial court held that the Sherman Act was applicable to the consolidation, thereby sustaining the only substantial question of law involved in the proceeding below in favor of the Department of Justice. The judgment appealed from is based upon the trial court's decision that under the facts as disclosed by the proof in this particular case no violation of the Sherman Act was shown. Thus, the only question for the consideration of the Court at this time is whether the record supports the trial court's decision on issues of fact.

This suit was filed after consolidation was consummated† and immediately thereafter the Court, on motion of the plaintiff, entered an order recognizing the effectiveness of the consolidation and authorizing the consolidated bank to carry on business as a national bank, but requiring it insofar as reasonably possible, consistent with law and sound banking practices, to keep separate accounts for the consolidating banks. The complexities of modern banking, with daily changes in investments, loans and deposits, transactions

*H. Rep. No. 1416, 86th Cong., 2nd Sess. 1960; S. Rep. No. 196, 86th Cong., 1st Sess. 1959.

†In an article entitled "Antitrust Legislation Affecting Bank Mergers," *Banking Law Journal*, May, 1958, at page 381, the author, Carl W. Funk, said:

> "The picture of an attack on a bank merger after it has been consummated is a shocking one. Public confidence in the institution would be shaken and might be entirely destroyed. The task of disentangling the two components of the merged bank would be almost insuperable. Great loss might result to shareholders, and possibly to the public."

in its capital stock, turnover of personnel, buying and selling equipment, modernization of facilities and other similar activities, makes it difficult, costly and virtually impossible to comply fully with this order. Obviously, the bank cannot remain in a static condition and fulfill its obligations to its depositors, its shareholders and the community and, after nearly two years, further delay serves to compound the difficulties.

In view of the these unusual and extraordinary circumstances and the further fact that the only question for the consideration of this Court at this time is whether the record supports the trial court's decision on issues of fact, we ask the Court's indulgence in presenting the following statements of the evidence and arguments in support of the trial court's opinion in somewhat more detail than might otherwise be appropriate.

BACKGROUND OF CONSOLIDATION AND REASONS FOR IT.

The record establishes beyond doubt that no one connected with this consolidation has or had any motive, purpose, intent or desire to restrain competition or to secure monopoly in the field of banking. This consolidation had its genesis in 1957 in the mind of a prominent, impartial Louisville banker, Mr. Ira J. Porter, whose business dealings and close personal associations with local bankers provided him with a rather intimate familiarity with Lexington and its banking conditions (PX 129, at page 3; Tr. 313, 402-6,

454). A sincere and honest desire to solve a community banking problem prompted his suggestion of the consolidation and its ultimate consummation. In recent years, Lexington has grown and expanded industrially to a remarkable extent (J.S. 29; Tr. 317-20, 407, 438-9, 478-9). This growth was characterized as "practically phenomenal" by one witness (Tr. 752-3). Since the end of World War II, several large national concerns have established manufacturing and distribution centers here (Tr. 317-8, 438-9). A College of Medicine, furnishing employment to several hundred, has recently been completed at the University of Kentucky (Tr. 319-20).

Certainly, this growth has contributed to an improvement in the economy of the area. At the same time, however, this extensive growth created the banking problem which prompted this consolidation. From 1950 to 1960, the population of Fayette County increased from slightly over 100,000 to almost 132,000 (DX 96; Tr. 752). Several satellite plants and service businesses were established to serve the newly established factories and the increased population. The national companies that established plants brought a paucity of funds with them in the form of bank deposits. Local banks were used largely for payroll and transfer accounts (Tr. 457). Efforts to satisfy the credit needs of these service industries, satellite plants and population increase soon resulted in all local banks finding themselves rather heavily loaned (Tr. 204-5). Certainly, the industrial and commercial growth and

expansion far outstripped the growth of local commercial banks during this period (DX 73; Tr. 545-7).

In seeking a solution to the problem, it was obvious that neither the community nor anyone involved would benefit from an effort of First National to lure funds away from other local banks even if the effort were successful (Tr. 458). Such an effort would not increase at all the local supply of lendable funds. New sources of funds from outside the community were needed and there appeared to be two possible sources for these additional funds. First, it was believed that a larger bank would have a substantially greater chance of persuading the national companies with local plants to leave larger balances on deposit to help satisfy the need that they had helped to create. Another source for additional funds lay in the possibility of bringing in additional correspondent bank deposits from small town banks in Central and Eastern Kentucky (Tr. 458-9). None of the other local banks had acquired any substantial amount of deposits from either of these sources (Tr. 322-3). In attempting to secure more funds from either of these sources, the principal competition that the merged bank will meet will be from banks located in Louisville, Cincinnati and elsewhere (Tr. 323). Additional deposits that might be brought in from these sources would clearly benefit the other local banks and the entire community, and would not give the merged bank any advantage over other local banks (Tr. 565-7, 469-70; 587-8, 611-3, 627, 814-5).

An overwhelming volume of proof was presented to show that First Security has a splendid chance of securing additional funds in the form of correspondent bank deposits from smaller banks situated throughout Central and Eastern Kentucky (Tr. 555-675). In selecting a bank to do correspondent banking with, small banks look at such elements as the capital structure, total assets and lending ability of a city bank (Tr. 578-9, 582, 587, 621-2, 625-6, 645, 790). The geographic location of the city bank is a most important factor to small town banks, for it often determines the promptness and efficiency of the service they receive from a city correspondent (Tr. 582, 598, 622-3, 646, 667-8). Lexington has a natural and ideal geographic location to serve small banks located throughout Central and Eastern Kentucky (Tr. 563, 583, 598, 622-3, 645-6). Lexington serves as a retail, wholesale and industrial center for a wide area in Central and Eastern Kentucky. People come to Lexington from that area to satisfy their educational, medical, hospital, business and recreational needs (Tr. 590-1, 622-3, 646, 667-8, 673-5). In short, the uncontradicted proof clearly shows that as a result of the merger First Security stands in a vastly improved position to secure additional correspondent bank deposits (Tr. 805-6) and there is no reason why it cannot obtain a substantial volume of these deposits if the merger is permitted to stand (Tr. 563-4, 651, 668-9, 673). Success in this respect would go a long way toward alleviating the need for additional funds in Lexington (Tr. 599-602).

The foregoing is a brief background of the consolidation and the reasons that led to its consummation. First Security does not profess to be wholly benevolent, charitable or unselfish in the premises. The ends sought to be achieved by the merger would necessarily improve the economy of the area. Any success in that respect would benefit First Security as well as all other local banks and the entire community.

ARGUMENT.

THE QUESTIONS INVOLVED ARE SO UNSUBSTANTIAL AS NOT TO NEED OR WARRANT FURTHER ARGUMENT OR CONSIDERATION.

(1) General.

In *Herzog* v. *United States,** it was stated that when the issue is whether a "substantial question" exists the first consideration is the soundness of the errors alleged. The burden of the Government's argument is error in the trial court's findings (J.S. 9-11). To sustain its charge of alleged violations of Sections 1 and 2 of the Sherman Act, the Government was obliged to produce proof sufficient to constitute "a definite factual showing of illegality" (*Appalachian Coals, Inc.* v. *United States,* 288 U. S. 344, 377 (1933); *Times-Picayune Pub. Co.* v. *United States,* 345 U. S. 594, 622 (1953)). That this is a Sherman Act case, brought by the Government, does not change the rule that the findings of the trial court should not be set aside unless they are found to be clearly erroneous.

*75 S. Ct. 349, 351 (1955).

In *United States* v. *Yellow Cab Co.*, 338 U. S. 338, 341-2 (1949), this rule was stated as follows:

> "It ought to be unnecessary to say that Rule 52 applies to appeals by the Government as well as to those by other litigants. There is no exception which permits it, even in an antitrust case, to come to this Court for what virtually amounts to a trial *de novo* on the record of such findings as intent, motive and design. While, of course, it would be our duty to correct clear error, even in findings of fact, the Government has failed to establish any greater grievance here than it might have in any case where the evidence would support a conclusion either way but where the trial court has decided it to weigh more heavily for the defendants. Such a choice between two permissible views of the weight of evidence is not 'clearly erroneous.'"

Other cases clearly show the efficacy of this rule.*

A determination of the soundness of the trial court's ruling requires a review of the proof. Keeping in mind

United States v. *United States Gypsum Co.*, 333 U. S. 364, 395 (1948), and *United States* v. *Oregon State Medical Soc.*, 343 U. S. 326, 332, 339. In the later case, at page 332, this Court said: "We are asked to review the facts and reverse and remand the case 'for entry of a decree granting appropriate relief.' We are asked in substance to try the case *de novo* on the record, make findings and determine the nature and form of relief. We have heretofore declined to give such scope to our review." Again, at page 339, this Court quoted with approval from *Boyd* v. *Boyd*, 252 N. Y. 422, 429, 169 N. E. 632, 634, the following pertinent comments: "Face to face with living witnesses, the original trier of the facts holds a position of advantage from which appellate judges are excluded. In doubtful cases, the exercise of his power of observation often proves the most accurate method of ascertaining the truth. . . . How can we say the judge is wrong? We never saw the witnesses. . . . To the sophistication and sagacity of the trial judge the law confides the duty of appraisal."

the basis of this motion, this review is not made to demonstrate that a fair preponderance of the evidence supports the findings of the trial court. Such a review will show that the evidence impels so conclusively these findings that no substantial question exists regarding their soundness.

(2) The Government's Proof.

In its effort to make a definite factual showing that the consolidation was illegal, the Government introduced three witnesses and 129 exhibits. The great majority of these exhibits are statistical charts and tables showing the relative size of local banks in the many phases and functions of banking. Every single one of these charts and tables is made from various reports and other data that reflected the relative size and status of local banks as of one specific date; viz., December 31, 1960. The Government sought to ignore the past history which shows that the largest local bank has shown a steady decline in its relative size in competition with other smaller local banks. From its size alone as of one specific date, the Government requested the trial court to draw the inference that other local banks could not effectively and successfully compete with First Security.

The statistics quoted by the Government are accurate (J.S. 13-14). They need no repetition. The inference which the Government seeks to have drawn from them is refuted by its own witnesses. Their three witnesses were officials of three of the four remaining

local banks. They seek to create the impression that all four remaining local banks officially opposed the consolidation at the time of the trial (J.S. 4). This is also incorrect. A fair appraisal of the record supports the inference that only two of the remaining four local banks officially opposed the merger at the time of the trial. Although officials of Second National Bank and Trust Company opposed the merger earlier, we are quite confident that if that bank continued to oppose it at the time of the trial the Government would have had no trouble in producing one of its officials to so testify. No such witness appeared and testified. One of their chief witnesses, Ernest S. Clarke, was forced to concede under cross-examination that his bank had never adopted any official position whatever with respect to whether it favored or opposed the merger. He even admitted that some of the Directors of his bank may have expressed the belief that his bank would stand to benefit from the merger (Tr. 65-7). Despite the neutrality of his bank, Clarke has been quite forceful in his personal opposition to the merger (Tr. 62-3). Personal disappointment from a previous failure that he encountered in an effort to merge his bank with First National is offered and suggested as a plausible explanation for his strong personal feelings on the matter (Tr. 67-74). Certainly, if the merger of First National and Clarke's bank had been accomplished in 1952, the relative size of the resulting bank would have been only slightly less than that of First Security (DX 22, 26, 38). The relative

size of the bank that would have resulted from such a merger was not a factor that contributed to the failure of the negotiations (Tr. 70-74). Two years later Clarke's bank merged with Citizens Bank and Trust Company (Tr. 60, 65, 100).

Clarke's own testimony refutes the inference that the Government seeks to draw from its statistics. Moreover, it shows that his strong personal opposition to the merger is motivated by some factor other than a genuine belief that his bank cannot effectively and successfully compete with First Security.

It is to be remembered that First Security resulted from a consolidation that was effected on March 1, 1961. Hence, First Security operated as a consolidated bank and competed against other local banks for the last ten months of 1961. In comparing the nature and intensity of the competition that existed among local banks prior to the consolidation with that which existed after the consolidation, not a single Government witness saw any difference. Clarke said: "I can see no difference" (Tr. 138). Stilz, another Government witness, admitted that he had observed no adverse effect upon any of the operations of his bank (Tr. 210). Layman, the other Government witness, expressed no opinion at all on the matter.

Although his bank competed against First Security for ten months in 1961, Clarke had no hesitancy in signing a report to his shareholders stating that his bank had experienced a "continued and unprecedented growth in its business in 1961" (Tr. 133-4; DX 2,

page 1). In the seven years since its merger in 1954 Citizens Union had increased its total assets by slightly over $10 million (DX 1). About half of that seven year growth occurred in 1961, when it grew $5,049,369 in total assets (DX 35, page 1). Actually, the growth of Clarke's bank in 1961 in terms of total assets "was over twice as much as during the four previous years combined" (Tr. 136-7). Clarke modestly admitted that his bank "did a pretty good job last year" (Tr. 115). His bank's gross operating income in 1961 was the highest in the bank's history (Tr. 134). As bearing upon its future competitive ability, Clarke's bank "has all of the facilities, the financial resources and the ability to handle all of the good banking business (it) can get," in 1962 and ensuing years (Tr. 139).

Clarke's efforts to contradict the foregoing, amounts to nothing more than expressions of apprehension concerning their ability to compete. He repeatedly said: "I am very apprehensive about that" (Tr. 47-8, 52). Even his apprehension was admitted to be entirely conjectural. He frankly said of his apprehension: "That is entirely conjectural" (Tr. 103). The Government's other two witnesses expressed the belief that it will be more difficult to compete (Tr. 179, 224). They also said that other mergers *may* be seriously considered by other local banks (Tr. 60, 171-2, 232). As the trial court stated, this testimony is "based merely upon surmise and is lacking in factual support" (J.S. 29).

Apprehension should not be permitted to override clear and undisputed facts to the contrary. As for the

expressions that it will be more difficult to compete in the future, we say that keeping pace in a keen and intensive competitive aura was never intended to be easy. Competition is a double edged sword and its intensity is felt both ways. Better service is bound to result as long as competition remains within reasonable bounds. The statement that other mergers *may* be considered is equally without merit. Bank mergers are now subject to rigorous regulation and no one can truthfully say that a merger of other local banks will be permitted if it is not in the public interest, or that it will be denied if it is in the public interest.

The foregoing constitutes the substance of the Government's proof. The inferences sought to be drawn from their statistical proof and the surmise offered by their three witnesses were fully refuted by clear and positive proof to the contrary offered by the consolidated bank.

(3) The Consolidated Bank's Proof.

(a) COMMERCIAL BANKING.

The proof in behalf of the bank consists of 97 exhibits and the testimony of 18 witnesses. The testimony of seven of these witnesses was concerned with the ability of the merged bank to secure additional correspondent bank deposits.* Their testimony on the point was clear, positive and uncontradicted. It has been previously considered.

*These witnesses were Miller, Boswell, Beckett, J. Phil Smith, Elliston, Daniel Routt and Forsee. Other witnesses testified on the point but their testimony also covered other matters.

Statistics based on the relative size of local banks as of one single date show absolutely nothing about the ability of banks to compete. For that reason, the appellees' charts and tables covered a rather lengthy period preceding the merger. They show beyond doubt: (1) the extreme difficulties encountered by the largest local bank in holding its relative position in competition with smaller banks, and (2) a pattern of steady, substantial growth on the part of the smaller local banks.

The dollar volume and percentage of total of all local bank deposits and loans are shown for each local bank for each year from 1935 to 1960 (DX 22, 26). The Government insists the mere fact that the merged bank held 52 percent of the deposits, 53 percent of the assets, and 54 percent of the loans held by all local banks at the time of the merger is sufficient without more to constitute a violation of the Sherman Act. Yet, at year end 1942, 1943 and 1944, First National held a greater percentage of such deposits than First Security held at the time of the merger (DX 22, 35). At the end of 1942, First National held 53.7 percent of such deposits. Eleven years later at the end of 1953, First National had declined to the point where it held only 38.7 percent of such deposits (DX 22). Therefore, in a period of eleven years, First National, the largest bank in town, suffered a drop in its percentage of deposits of exactly 15 per cent. Perhaps it will be said that percentages are misleading. In its dollar volume of deposits, First National held almost $43 million at

the end of 1945. It was not until nine years later at the end of 1954, that this bank held that much in deposits at year end again. No other local bank experienced the same problem and in fact all other local banks showed an increase in deposits in the same period. At the time of the merger First National held only 40.1 percent of such deposits (DX 22, 27).

The same pattern exists with respect to loans. At the end of 1936, First National held 56.8 percent of all loans held by all local banks. Again, this is a greater percentage than was held by First Security at the time of the merger (DX 24, 26, 35). Yet, at the end of 1954, First National held only 36.6 percent of such loans. Thus, in eighteen years First National suffered a decline in its percentage of loans of over 20 percent. At the time of the merger it held only 40.2 percent of such loans (DX 24, 26).

Other facts illustrate the fallacy of the Government position. Central Bank was the last of the existing banks to enter into active competition. It started around 1945 and at the end of that year it held $1,148,000 in deposits. At the same time, First National held a total of $42,923,000 and therefore was over 37 times larger than Central Bank (DX 32). In competition with each other during the next fifteen years, Central Bank gained $12,996,000 in deposits while First National gained only $15,750,000. During the same period all other local banks showed a substantial deposit growth (DX 32).

At the end of 1945 all local banks held total deposits of $84,247,000. Of this total First National held

$42,923,000 or 50.9 percent of the total. At year end 1960, all local banks held $146,445,000. Thus, in the 15 year period total deposits were increased by $62,198,000. Of this total growth First National acquired only $15,750,000, or 25.32 percent. To have maintained the relative position which it held in 1945, First National would have had to acquire 50.9 percent of this growth. Therefore, it actually acquired less than half of the percentage of the growth necessary for it to maintain the relative position held by it in 1945 (DX 22, 32). Again, Central Bank held only 1.4 percent of the total deposits held by local banks in 1945. However, in the ensuing 15 years that bank acquired 20.90 percent of all additional or new deposits acquired by all local banks. Every other local bank grew at a faster percentage than First National during that period (DX 32).

As stated, First Security operated as a merged bank for ten months in 1961. A comparison of the relative position of First Security at the end of 1960* with its relative position at the end of 1961 shows a drop in the percentage of deposits, loans and assets held by it during the year. This decline was as great as 1.5 percent in deposits where the drop was from 51.94 to 50.44 percent (DX 35). The Government insisted that this was but the usual attrition that follows a merger. The proof is to the contrary. It shows that attrition is generally more severe in the correspondent banking

*The banks were not consolidated until March 1, 1961, but the figures referred to show First National and Security combined as of the end of 1960.

field (Tr. 813). First Security lost none of its correspondent bank accounts in 1961. In fact, it gained two such accounts (DX 96). This loss is simply the result of a year's competition and it graphically illustrates the extreme difficulty if not impossibility of a bank the relative size of First Security maintaining its relative position in a competitive atmosphere.

While on this appeal it does not seem that the Government contends that any particular type of loan constitutes a separate product market for measuring the impact of this merger, it made such a contention in the trial court. In its Jurisdictional Statement the Government does, however, recite the percentage of single payment loans to individuals, commercial and industrial loans and FHA Title I loans that First Security had (J.S. 13). The evidence proves the falsity of their position and fully explains these percentages. Basically, banks lend their deposits and the total amount of loans they can make has a direct relation to their total volume of deposits. A bank with a larger volume of deposits can naturally make a greater volume of loans. However, the particular types of loans that banks choose to make varies considerably from one bank to another. The proof clearly bears this out. The smallest Lexington bank has the largest dollar volume of "Real Estate Loans Secured by Farm Land." Central Bank had over $1.8 million in "Other Loans Pertaining to Securities." First National, the largest bank, had none. Central Bank had almost $900,000 in "Loans to Individuals: To purchase other retail goods on Installment Basis," or more than twice

as much as any other local bank. This certainly does not prove that these two smallest banks have the power to dominate these fields of lending. It proves that they cater to that business while other local banks do not. In the field of commercial and industrial loans, First National held $7.5 million, Citizens-Union held $6.1 million, while Bank of Commerce, a still smaller bank, held almost $6.2 million. Central Bank had no loans in this category (DX 38, page 3). As vigorous a competitor as Central Bank has been in other fields, it cannot be truthfully said that the size and competitive efforts of other local banks kept it out of this field altogether.

In the field of "Single Payment Loans to Individuals for Personal Expenditures" First National held slightly over $5.5 million. Only two other banks in town held over $1 million in loans of this type and they were the two smallest banks in town. Citizens-Union, the second largest bank in town, held not a single dollar in loans of this type (DX 38, page 3).

The largest percentage of any particular type of loans held by First Security was in the field of FHA Title I Loans.—It had a high percentage of this type of loan simply because other local banks refuse to be bothered with the "red tape" involved in making such loans. This was frankly conceded by one of the three Government witnesses.* Yet, because no other bank

*In explaining the position of his bank, Stilz said: "We have never gotten into that field. We make a type of loan that compares to the FHA, but it naturally is not an insured loan. We feel if the borrower is entitled to the credit we don't need the insurance. We feel if the loan is of such a nature that it ought to be insured, then we oughtn't to make the loan" (Tr. 180).

will go to the trouble of fulfilling this public need, First Security, which is willing to endure the red tape, is charged with dominating the field. The proof clearly shows that the differences in the types of lending banks engage in is not the result of pressure from other banks but rather it is the result of a deliberate choice made by the management of each particular bank (Tr. 847-8).

There are a multitude of cities in this country where the largest bank has as great or even greater percentage of the assets held by all local banks than First Security held at the time of this merger (DX 88, 89). Certainly, if there actually exists the evil consequences which the Government attributes to First Security's size alone, these same evil consequences would exist in countless other cities and the Government could and would have produced witnesses to so testify. Instead, it produced not a single witness from any such city. First Security found and produced bankers from comparable cities in which the relative size of the largest bank was as large or larger than First Security and each of them testified that size carried no such evil consequences with it. Each of them was associated with a smaller bank and each said that size gave the largest bank no advantage (Tr. 629-33, 710; DX 81, 82). The assumptions and inferences sought to be drawn by the Government cannot stand in the face of such positive proof.

(b) THE TRUST FIELD.

The only relevant product market is the field of commercial banking as a whole. It is improper to dissect banking, as the Government attempts, and select the trust field as a separate product market, unless the power and dominion of the bank in the trust field gives it the ability and power to affect the whole of commercial banking in a particular geographic area. In its argument to have the trust field considered as a separate product market the Government argues that individuals do not compete with banks for the business. This is directly contrary to the testimony of many witnesses, including its own (Tr. 97-9, 183-5, 893). They say individuals do not actively solicit the business, whereas banks do. They say banks possess unique characteristics and can give better and more varied service than individuals. They say that various attributes are found in banks but not in individuals (J.S. 19). All of this cannot obscure the truth. Individuals have always gotten and are still getting a major portion of this business locally (DX 74). If banks get more of this business, they will get it from individuals. If one has business that another wants, the latter must compete for it. Clearly, there is keen competition between banks and individuals for this business. None of the Government's arguments merit a ruling that the trust field is a separate product market. However, even if the trust field is considered as a separate product market, the proof positively shows that no restraint of trade, illegal power or dominance exists in this case.

The history of the trust activities of local banks dispels the notion that local banks which have a minimal amount of trust business have made an aggressive effort to obtain the business. Security was organized in 1886 to serve primarily as a trust institution (Tr. 275). Local businessmen and directors of other local banks served as directors of Security in its early years (Tr. 277-8). For this reason it is clear that none of the other local banks made any real effort to obtain this business until around 1940 when First National began to actively seek the business (Tr. 278). Union Bank had trust powers continuously from its organization in 1906, but it never had a separate trust department. Citizens Bank had trust powers from its organization in 1931, but it did not establish a separate trust department until 1948 (Tr. 43, 100). Even now the total personnel in Citizens-Union's trust department consists of one full time trust officer and two ladies employed as bookkeepers and secretaries (Tr. 100-2). Bank of Commerce has had trust powers since it was organized in 1916 (Tr. 163-4), but it has never had a full time trust officer. Today, its personnel consists of one man who devotes 5 percent of his time to trust business and two ladies are employed as clerks. One of these ladies is being trained to succeed the other, who is aged and needs help (Tr. 186-7). Although the president of this bank says it seeks trust business, the evidence clearly shows that it merely handles such business as comes to it through gravitation (Tr. 898-9). In recent years a director of this bank, a past president for many

years, and the mother of its present president passed away. All of their estates were administered by individuals. Its president, in his individual capacity, is now administering his deceased mother's estate (Tr. 187-8). In the past 22 years all out of town banks received a greater volume than Bank of Commerce of the probate business administered in our local probate court (DX 74).

The Government has professed grave doubt as to the ability of other local banks to succeed in the trust business in view of the size of First Security. Yet, its own witnesses do not share such doubt. Stilz, a Government witness, admitted that at one time Security was "by far" the dominant bank in this field. He guessed it had more than 95 percent of the trust business held by local banks. Yet, about 20 years ago First National hired a full time trust officer and put forth a "special effort" in this field and has succeeded in obtaining a substantial amount of the business (Tr. 205-6). About six years ago, Second National, now the smallest local bank, acquired trust powers and it has been fairly successful in obtaining business of this type (Tr. 278, DX 33). Since this consolidation occurred, and only two or three months prior to the trial of this case, Central Bank acquired trust powers and began operating a trust department for the first time "with the anticipation of success in it, in spite of the fact that the merger had already taken place." A substantial new addition to that bank was then under construction and a portion of it was to house its new trust department. At the time of the trial it had

already obtained trust business and it expected to be able to develop this phase of its business (Tr. 258-260). The foregoing actions speak far louder than contrary assumptions and inferences. If a bank chooses not to vigorously seek this business, no one should be able to compel it to do so. However, if a bank chooses that course, it should not be heard to complain when another bank goes to the trouble and expense of obtaining it. The record clearly shows that the attitude of management of various banks toward trust business differs. Some banks actively seek it while others do not (Tr. 898-9). If they are to get the business, banks must generally go after it. Persuasion and effort are involved, as it is not generally the type of service that a customer feels compelled to obtain at a bank (DX 74). If the directors and officials of a bank and their immediate families do not use the trust facilities of their bank (Tr. 187-8), it is hardly surprising that the general public will look elsewhere for such service.

Figures and statistics constitute the whole of the Government's argument. Size is of little or no consequence in this field. After a bank commences to administer an estate, competition ceases for that business. The competition is for future trust business, not the assets which a bank already holds in trust (Tr. 334, 428, 886). The assets which the merged bank holds have been accumulated over a period of many years (Tr. 291-2).

If other local banks care to undertake the expense and effort necessary to get trust business, the proof clearly shows that a large amount is available. The

amount of corporate trust business done by local banks is rather insignificant by any standard (DX 56). Hence, we are concerned with the personal trust business. From 1940 through 1961, individuals administered estates valued at over $79 million in the Fayette County Court, which is some $9 million more than the carrying value of all trust assets held by all local banks at the end of 1960 (DX 74, 35). All banks, regardless of size, have an opportunity to secure this business because more and more of it matures daily (Tr. 885-6). Success in acquiring this business depends not upon the size of the bank but upon the effort and energy put forth to secure and service it. A small bank has an equally good opportunity as a large bank if it earnestly pursues it. The banks that really go after the business will get it (Tr. 880-1, 886).

Certainly, there are towns where efforts have been made by banks to establish trust departments from scratch where a disparity exists in size of trust and commercial departments comparable to that found here. If experience had shown that such disparity in size rendered it impossible to develop a trust department, we are confident that the Government would have found and produced witnesses to so testify in this case. They failed to produce a single witness and left the matter to conjecture. Appellee found and produced several witnesses with a contrary experience and their testimony stands undisputed (Hurley, Tr. 896-912; Yarnell, 697-702; Porter, Tr. 428-9; Sinclaire, Tr. 885-6). The surmise and conjecture of the Government to the contrary cannot stand.

(4) Summary of Argument.

Congress has recognized that commercial banking is wholly different from the ordinary "free enterprise" industrial or commercial business (Tr. 31, 413). Banking is one of the most highly supervised and regulated of all industries (Tr. 412, 464, 694, 768).* The safety of the public's money is involved and hard experience has taught that the protection of those funds is more important to the welfare of the nation than the maintenance of a policy of unrestricted competition in banking (Tr. 199, 411-3, 467, 779-780, 783-5). This regulation and supervision necessarily has the effect of sharply limiting the scope and character of competition among banks (Tr. 411, 465). The principal area that it leaves in which banks compete with one another is in the service or quality of service they render (Tr. 83, 118, 465, 695, 771). The chief factors which determine the quality of service that a bank renders are the ability, quality and aggressiveness of management and the efficiency of a bank's operation (Tr. 695). Size does not give a large bank any competitive advantage in the quality of service it can render because small banks can render services of the same quality and type as a large bank (Tr. 113-4, 442-4, 633-4, 695).

Whatever experience may show to be true in private industry, the evidence is clear that the growth of small banks is not adversely affected by the existence of a large competing bank. It is possible for small

*Most of these regulations are detailed in the proof, but they are so numerous that even citations to the record to all of them would require too much space to do so.

banks to grow and even flourish in spite of that competition (DX 1, 2, 4-6, 22, 26, 30-2, 80-2, 88, 89, 91 and Tr. 126, 201-2, 414, 486-491, 730, 792-8, 803). The fact is that in most cases small banks grow at a faster rate than large banks and the latter find it extremely difficult if not impossible to maintain their relative position in competition with smaller banks (DX 4, 5, 22, 26, 30-2, 80-2, 88, 89, 91 and Tr. 416-7, 486-491, 796-8). The higher the percentage of the total banking assets in a given community that the largest bank holds, the more difficult it becomes for that bank to maintain its relative position in competition with smaller banks (Tr. 732).

Size is no criterion for determining whether or not a particular bank can apply competitive pressure. The smaller bank has equal if not greater power and ability to create a situation that would cause larger banks to adopt different charges or payments such as interest rates of time and savings deposits (Tr. 77-9, 135-6, 195-7, 632, 635-6, 711, 738). Until recently, the smallest local bank has always been the first local bank to raise the interest rate paid on time and savings deposits. Other local banks have always later followed its lead (Tr. 77-9, 135-6, 195-7). There are certain definite advantages that a small bank has over a large bank. One of First Security's local competitors has often advertised the virtues of being smaller, and that bank's president, a Government witness, testified that he believed this was true (Tr. 257). Some of the many advantages that a small bank has are enumerated in the evidence (Tr. 633, 731).

Banks, whether large or small, do not own their raw material (deposits), they owe them. They are dependent on the will or whim of the depositors for these funds. Customers in Lexington as elsewhere are free to make their demand deposits in any bank they desire and withdraw them as they choose, and this is equally true of large banks as it it is with small banks. The merger has not made the slightest change in this (Tr. 129-30).

Theories and assumptions cannot be substituted for facts. Infereuces cannot rise to the dignity of "a definite factual showing of illegality." Percentages of the banking business, whether great or small, without evidence of their effect, if any, on competition are meaningless. Appellant suggests no standard against which the size of banks may be measured in order to determine their ability to compete with one another. Yet, appellant vigorously asserts that consolidation must be dissolved simply because the consolidated bank occupies a particular position on an arbitrary scale. After the merger, Lexington has five sound, well managed, progressive banks that have the ability and willingness to serve the financial needs of this area. While this is a rather large number of banks for a city of its size (DX 64) we submit that it should be left as is. Clearly, appellant has fallen far short in its efforts to show that this merger violates either Section 1 or 2 of the Sherman Act. No substantial question has been shown to exist.

CONCLUSION.

No substantial question worthy of commanding the further attention and decision of this Court has been shown to exist. Every important legal issue raised by appellant was decided in its favor by the Court below. This consolidation was held to be subject to the Sherman Act. The activities of the appellee in interstate commerce were held sufficient to render the Sherman Act applicable. The sufficiency of the proof to make "a definite factual showing of illegality" is the only major issue left for appellant to raise and argue. A fair review of the evidence leads to the inexorable conclusion that no substantial question has been shown to exist.

With a favorable trial court decision on the major legal issues, appellant certainly will not seek a redetermination of those matters in this Court. However, assuming that these legal issues are novel at the moment, and would otherwise merit a decision by this Court, they will not be such when this case is decided. These same legal issues will have been determined in *United States* v. *Philadelphia National Bank* (No. 83, this Term), in which this Court has already noted jurisdiction.

A major difference between this case and *Philadelphia National Bank, supra,* is that the two banks in that case have never merged. Appellee has operated as a consolidated bank for almost two years. This factor has legal as well as practical significance. It has legal significance because the Court has the benefit

of the results of almost one year of competition between appellee and other local banks. Its practical significance lies in the extreme difficulty, if not impossibility, of operating the consolidated bank in a prudent, legal manner while trying to relate or identify present day to day business with either pre-existing bank. This task increases daily.

For the foregoing reasons, the questions raised by appellant are so unsubstantial as not to warrant or justify further consideration of this case.

Respectfully submitted,

JAMES PARK,
R. W. KEENON,
CLINTON M. HARBISON,
Attorneys for Appellee.